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DRAFT
BANKS AMENDMENT BILL

SUMMARY OF COMMENTS RECEIVED ON THE DRAFT BILL PUBLISHED BY NATIONAL TREASURY FOR COMMENT IN NOVEMBER 2014[1]

[1] This document is a summary document to assist the Standing Committee on Finance hearings in Parliament, held on 17 March 2015. It is a draft document, and represents the initial response of National Treasury. The document has not been approved by the Minister of Finance.

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3.	Futuregrowth Asset Management	Ryan Kieser
4.	Coronation	
5.	Curator of African Bank Limited	Tom Winterboer
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7.	Investec Asset Management	Nazmeera Moola
8.	Tier II Debtholder Committee	Thea Hartman
9.	FirstRand Group	Yvette Singh

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Amendment of section 69 of Act 94 of 1990

Reviewer	Section	Issue	Draft National Treasury response
Tier II Committee	**General** Note: Further submissions on the Banks Amendment Bill (12_03_2015)	**Submission in relation to precedent bank resolution legislation in other jurisdictions** We refer to the presentation on the Bill given by the National Treasury to the Standing Committee on Finance on **3 February 2015** (the NT **Presentation**). In particular, reference is made to National Treasury's citing of legislation in other jurisdictions which introduced certain resolution regimes for Banks, to support National Treasury's assertions that the Bill should be passed into law in South Africa, in its current form. While the Tier II Debtholder Committees does not dispute the validity and role of resolution regimes per se, it is our submission that the respective statutes and circumstances leading to the enactment of such statues in the jurisdictions cited by the National Treasury are not analogous to the circumstances surrounding the resolution of ABL. While we do not wish to engage on a case-by-case rebuttal of each point on the presentation, our main objections are as follows: (i) **Urgency and timing of legislative change:** the apparent urgency indicated by the National Treasury in passing the Bill in its current form is aimed specifically at addressing the issues arising from the ABL case, instead of allowing domestic regulatory authorities to undertake a broader review of what is appropriate for South African banking resolution regimes (outside of ABL-specific	i) **Urgency and timing**. ASISA has formally been participating in formal discussions regarding a new resolution framework from at least Feb 2014, 6 months before the intervention of African Bank. • Policy makers opted to wait for the completion of 2 international peer reviews regarding best practice to ensure a harmonized approach as far possible with other major jurisdiction in which SA banks operate. Europe completed their Resolution Frame work in May 2014. The long lead time in Europe and SA reflects complexity not indifference. • Directive 2014/59/EU of the European

			requirements). We note that discussions regarding the introduction of a new resolution regime for banks in South Africa have been ongoing since December 2013 and up until now: (i) there has not been any urgency to implement such a regime in South Africa; and (ii) there has been no consultation on the subject by the regulator with the investment committee represented by the Association for Savings and investment South Africa (ASISA).	Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance
		(ii)	**Basel II vs Basel III frameworks:** with regulators in other countries adopting resolution regimes, banks in those jurisdictions have been encouraged to issue Basel III capital and/or are required to ensure that capital issues id subject to write-down at the point of non-viability. Conversely, the lack of urgency to move to a resolution regime by the South African authorities indicated to local banks that the regulator was comfortable with the status quo of Basel II capital with the view of phasing it out. In particular, we refer to the BCBS statement from 13th January 20111, which explicitly states that (a) new Tier 1 and Tier 2 notes issue must include a provision allowing these to be written off at the point of new viability, unless the governing jurisdiction has laws in place allowing for such a write-off (which is not the case for South Africa), and (b) instruments that no longer qualify as Tier I of Tier II (given that they cannot be written off) should be phased out over 10 years (acknowledging that they are not "bail-in-able" instruments); and	ii) **Regulators have opted for a phased in approach as far as possible.** The events rendered this impossible, and facing potential systemic risk have acted.
		(iii)	**Difference with ABL case:** where certain jurisdictions	iii) The SARB having been given

		identified in the NT Presentation did not previously have a resolution regime, the law was changed retrospectively only to resolve banks in regimes where there was an immediate systemic risk, i.e. a risk of collapse of the entire financial system or markets. It is our submission that there is no immediate systemic risk in the case of ABL and the examples provided in the NT Presentation demonstrate idiosyncratic differences with the case of ABL. As further explained below, we consider that the sole purpose of the introduction of a resolution regime, as proposed in the Bill, is to allow the curator of ABL to implement a restructuring deal without the consent of some of ABL's creditors, who would be deprived of their property rights retroactively. While we believe that a long-term bank resolution framework is required, and do foresee a phased implementation of the Basel III regulatory standard as beneficial to the broader financial system in South Africa, it is our submission that the Bill is aimed specifically at addressing the issues arising from the ABL case, and should, therefore, not be implemented retrospectively in order to push through the recapitalisation of ABL at the expense of one group of creditors over and above other groups of creditors. We also refer to the Appended Presentation in support of our submission. **Urgency and timing of legislative change** As the Standing Committee is aware, banks have been facing	the mandate for financial stability has reached the conclusion that there is a risk to systemic stability and that the proposed intervention (which requires changes to the Banks Act) represents the best least cost intervention to restore stability. Nowhere in the world have regulators sought consensus from market participants in determining the existence, probability, or extent of systemic risk. **Basel II vs Basel III frameworks**. This submission is chiefly concerned with the timing and associated policy actions or lack thereof, which has then been used to draw inference of policy priorities of government. National Treasury has been working on a consolidated comprehensive resolution regime in which it intended to add many of the features currently contained in the Amendment Bill in addition to others. The timing reflects the complexity of issues which include issues such as Deposit Insurance and linkages to Twin Peaks (to be placed before Parliament and approved by

		global financial pressure ever since the onset of the global financial crisis in 2008. Immediately after the onset of, and in response to, the global financial crisis various countries introduced resolution regimes in order to be better positions to address any future challenges in the financial sector and to better manage the failure of a financial institution in an orderly fashion. South Africa is a member of the Financial Stability Board (FSB), and the FSB's mandate is that it "monitor and make recommendations about the global financial system". Since 2011, the FSB has been actively promoting changes to local banking regulation in order to develop strong regulatory, supervisory and other financial sector policies. As a result, in 2011, European countries undertook the decision of implementing the Basel II features, such as, the ability for creditors to be bailed-in as well as to write-off certain liabilities in a resolution process, which, in some jurisdictions have been enacted, and in others will be implemented from 2016 (a forward looking and not retrospective change). Despite these initiatives in Europe, South Africa has showed no urgency in taking action and to amend its regime and to shift its banking framework to incorporate Basel III or FSB bank resolution mechanics. As is highlighted on page 5 of the Appended Presentation, in contrast to other countries, South Africa does not have any banking resolution measure currently in place. South Africa has had four years to consider implementing new legislation and to decide on any modifications to its banking sector regulations and, despite the previous bank failures on this jurisdiction, the most significant of which was SAAMBOU, there does not seem to have been any urgency in implementing such legislative changes until the curatorship of ABL.	Cabinet). The curatorship has necessitated expediting certain elements of this consolidated resolution framework but has not changed NT's view on their general scope. The contemplated powers are intended to be used generally in resolution. NT has never used policy timing to communicate government policy priorities. Indeed NT does not want to delay provisions that are necessary now to accommodate the financial convenience of a small group with narrow interests. There has been no challenge on the usefulness of the proposed tools only the timing. **Differences between bank resolution regimes in other jurisdictions and the ABL case.** No two bank failures are the same, and NT accepts that in certain jurisdictions there may have been less inconvenience to creditors due to powers being introduced outside of a stressed environment. This does not negate the appropriateness or the need for the proposed amendments. To delay the amendments would be to elevate the interest of a small, well compensated,

		Therefore we submit that it is reasonable for the creditors to assume that the governing bodies in South Africa were comfortable with the curatorship proceedings that are currently enacted, which is a well-established procedure that has been used in successfully restructuring financial institutions in the past. The South African authorities have, up until now, shown no urgency in making any amendments to the regulatory and legislative framework within which banks operate, and in particular have not been concerned by the way in which banks hold regulatory capital under the Basel II framework, which does not require write-down at the point of non-viability. **Basel II vs Basel III frameworks** Following the financial crisis in 2008, the members of the Basel Committee on Banking Supervision agreed a new regulatory standard on bank capital adequacy, Basel III, in 2010-2011. Under Basel II, changes were made to the terms and rights of the regulatory capital held by banks compared to Basel II securities. New Basel III terms will reduce rights of tier 2 noteholders significantly, relative to Basel II. In particular, under Basel III, regulatory tier II capital can be "bailed-in" and therefore written-off in the event of a bank's insolvency. On the other hand, as stipulated in the BCBS statement form the 13th January 2011, Basel II instruments must be phased out over a period of time, given that they cannot be written-off, which acknowledges that Basel II instruments are not "bail-in-able" in the manner envisaged under Basel III.	financially sophisticated group above wider society. **Constitutionally**, the NT is happy with the legality of the Bill, having received various opinions from senior council. Full legal opinion are attached.

		In 2014, global banks issued $174bn Basel III capital instruments[2]. The rise in dent issuance shows that institutions globally are aware of the different treatment to the types of notes and demonstrates a clear recognition that Basel III notes are different and need to be treated differently to Basel II notes. The ABL Tier II Notes are issued under the Basel II framework and never contemplated being "bail-in" in their terms and conditions. The Bill seeks to provide the curator with the power, retrospectively, to treat the ABL Tier II regulatory capital as capital held under Basel II rather than the Basel II framework, despite the clear recognition that both types of notes are different forms of capital. It is our submission that the SARB and the National Treasury did not previously challenge the difference between how Tier II capital was held under the Basel II and Basel II frameworks with any sense of urgency, SARB and the National Treasury only recently did so to support the changes proposed in the Bill at a time when such changes, if implemented, would apply to the specific case of ABL. **Differences between bank resolution regimes in other jurisdictions and the ABL case** In the NT Presentation, the National Treasury listed a number of examples of previous cases in which national legislation was passed in order to implement a banking resolution. It is our submission that the examples provided differ from the ABL case	

[2] Source: Financial Times (date 11th February 2015)

		and demonstrate "idiosyncratic" features that are not applicable to ABL, for example: (a) **Northen Rock (UK):** the assets transferred to UKAR (the "bad" bank) hold substantial value with Tier II notes having been tendered for and redeemed ar c.50 per cent, or more of their face value. In addition, the subordinated liabilities have been tendered for and redeemed ahead of the government in recovery; and (b) **Banco Espirito Santo (Portugal):** a framework for banking resolution was already in place since 2012, and legislation was passed only in order to establish a bridge bank. Creditors had therefore already been forewarned that they could be bailed-in (comparing this to South Africa, where regulators were comfortable with the Basel II framework remaining in place with no requirement for Tier II capital to be written-off in the event of bank insolvency). The majority of other countries in which creditors were "bailed-in" had pre-existing regimes in place for resolving banks. When banks failed, the regulators applied the framework already in place. Creditors were aware of this potential risk prior to the resolution being put in place. This is not the case for ABL, where the regulators have not acted on the 20111 FSB directives and creditors could reasonably assume that the regulators were comfortable with the status quo and legal regime already in place. Furthermore, cases in which governments retrospectively changed the legislation were those in which there was a systemic risk to the financial system and governments were unable to	

		remedy such risk due to the size of the exposure (see appended slides). In comparison, ABL's assets comprise only 3 per cent of South Africa's GDP and as such, there is arguably no systemic risk to South Africa's financial system were ABL to continue in curatorship or go into liquidation. The Tier II Debtholder Committee would therefore stress that the examples provided by the National Treasury in the NT presentation each had unique features that distinguish them from the case and circumstances of ABL and its position in the overall financial system of South Africa. Legislation has only been retrospectively applied in situations where there was systemic risk, such as in Iceland and Cyprus. **Applicability of "No Creditor Worse Off than in Liquidation" Principle** As expressed in our previous submission, the "No Creditor Worse Off than in Liquidation" principle does not presently form part of South African Law. In addition, it is our view that the principle should be introduced into our law to apply to curatorship, as it conflicts with certain constitutional principles as set out below. Section 69 of the Banks Act, 1990 (the **Banks Act**) does not permit the application of a "No Creditor Worse Off than in Liquidation" principle by a curator. The principle departs from a wholly different premise to that which is applicable in the curatorship process and is in fact inimical to the aims of curatorship as presently set out in section 69 of the Banks Act. The curatorship process differs substantially from the liquidation process. It is an alternative to liquidation, and has as its aim the	

		promotion of the interests of all the creditors of a bank. By choosing curatorship, the Registrar, at least temporarily, forgoes the power to liquidate as provided for in section 68 of the Banks Act. Accordingly, it is in our view not legally correct to treat the curatorship process as if it were a liquidation and accordingly rank the interest of the creditors as they would have been ranked had there been a liquidation of ABL. To do so would remove the very rational and purpose for the discretion and power which the curator enjoys under section 69(3)(b) and (e) of the Banks Act. If at any time the curator is of the opinion that there is no reasonable probability that the continuation of the curatorship will enable ABL to pay its debts and meet its obligations and become a successful concern, the curator is, in terms of section 69(2D) of the Banks Act, required to inform the Registrar of tis fact, and the Registrar will then have to consider invoking section 68 of the Banks Act, and effect a winding up of ABL. Section 69(2D) accordingly implies that the object of the curatorship process is to settle all debts and obligations, whether subordinated or not, and not merely some of them, and once it becomes evident that this will not be possible, the curatorship should be brought to an end. If the Bill were to be enacted, the proposed section 69(2C) would: (a) Require the curator and the Minister to consider whether the transfer means that creditors will not incur greater losses on the date of the transfer than they would have incurred had the bank been wound on that date. This would expand the powers of the curator and the Minister in a manner that will remove existing contractual rights	

		in that unsubordinated Tier II debt will become sub-ordinated, which would be unconstitutional as it violated the rule of law; and (b) Allow the curator and the Minister to implement a transfer by having regard to the counterfactual position that would exist if ABL were to be wound up – but in circumstances where ABL has not been wound up and where the Tier II Noteholders are therefore not afforded the remedies that would be available to them in the case of a winding-up, including for example, the ability to challenge impeachable transactions under the Insolvency Act, 1936, to apply for an inquiry to be convened under section 417 of the Companies Act, 1973, and to seek to extend liability for the bank's debts in terms of section 424 of the Companies Act. This would distort the distinction between curatorship and liquidation and violates the rule of law. **Constitutionality of the Bill** The Tier II Debtholder Committee is of the view that certain aspects of the Bill are unconstitutional and, accordingly, the Bill cannot be passed into law in its current form. We refer to the Opinion in support of our submissions herein. <u>Rule of Law</u> As indicated in the opinion, currently the contractual provisions of the Tier II notes read with the Banks Act and Regulations, specifically Regulation 38(14) do not permit the curator to subordinate the claims of the Tier II Noteholders in the absence of dissolution, liquidation or winding-up of ABL.	

		Further, as indicated above, section 69(3) of the Banks Act grants the power to the curator to prefer one creditor over another only to advance the objective of the curatorship, which is to return a bank, in this case ABL, to being a successful concern which is able to meet all of its obligations. The Bill, if enacted, will allow the curator to subordinate the claims of the Tier II Noteholders in situations other than those that are currently allowed, with none of the associated rights that would be available to the Tier II Noteholders in liquidation. This is accordingly a new consequence that the Tier II Noteholders could not have foreseen at the time that the contractual arrangement with ABL was entered into. In our view, this interference with the existing contractual rights of the Tier II Noteholders violates the rule of law. The Bill envisages incorporating the "No Creditor Worse Off than in Liquidation" principle into our law. This would allow the curator to treat the Tier II Noteholders as if there was liquidation as long as they are no worse off than if ABL was placed in liquidation. However, by choosing curatorship, the Registrar forgoes the power of liquidation, yet the Bill deprives the Tier II Noteholders of their statutory rights that they would otherwise have enjoyed in circumstances where ABL was wound up. This not only blurs the distinction between curatorship and liquidation but the Tier II Noteholders could not have anticipated the application of the "No Creditor Worse Off than in Liquidation" principle in the event that ABL were to be placed in liquidation. The Bill therefore violates the rule of law for this reason as well.	

		The proposed section 69(3)(j) allows the curator to disregard any contractual relationship that prevents ABL from granting security over the assets of the bank. This removes any rights that the Tier II Noteholders have in relation to preventing ABL from providing security over its assets. Again the alteration to allow the curator to override the vested contractual rights of the Tier II Noteholders violates the rule of law. <u>Arbitrary differentiation and arbitrary deprivation of property</u> The proposed section 69(2C) allows the curator to differentiate between creditors by treating some creditors less favourable than others. Section 9 of the Constitution of the Republic of South Africa, 1994 (the **Constitution**), prohibits arbitrary differentiation between categories of people if such differentiation is not rationally related to a legitimate government purpose – namely to maintain a stable banking sector and public confidence in the banking sector. The power granted to the curator to treat creditors differently removes the certainty as to how investors will be treated. Differential treatment of creditors of a bank in curatorship, where the creditors are uncertain as to how they will be treated cannot be rationally be argued to promote the maintenance of a stable banking sector. Likewise, in terms of section 25 of the Constitution the vested contractual rights of the Tier II Noteholders cannot be removed if the deprivation of these rights is not rationally connected to the purpose of promoting confidence in, or the stability of, the banking sector. A deprivation is arbitrary and unconstitutional if	

		it occurs without sufficient reason (see paragraph 59 of the Opinion). As with arbitrary differentiation between creditors, the uncertainty created by removing these contractual rights is not rational and not proportionate to the end sought to be achieved. We therefore submit that the Bill violates the rule of law as well as sections 9 and 25 of the Constitution. **COMMENTS AND RESPONSE TO THE 10 MARCH PRESENTATION** **Appropriateness of Tier II debt as an investment for pension funds:** (a) During the 10 March Presentation, it was contended that assist managers should never have invested pension money in Tier II instruments. This argument is problematic in two respects: (i) Firstly, Regulation 28 if the Pension Fund Act (drafted by the National Treasury) allows pension funds to invest up to 75% of assets in the equity of corporates which includes banks regardless of their rating. It is common cause the all the equity investment in African Bank Investments Limited has been lost. But there is a clear prospect of recovery of value for Tier II debt. From a risk perspective equity is always more risky than debt. Therefor if pension funds can invest 75% in equity, how is it that they should not invest in Tier II debt generally? How can it be said that it is prudent to invest pension money in	

African Bank equity but not in African Bank Tier II debt which ranks above equity? Quite simply, the contention that Tier II debt is inappropriate for pension fund investments is counter-intuitive and fundamentally flawed.

(ii) Secondly, the Tier II debt of all the major South African Banks (i.e.) ABSA, Standard Bank, FirstRand and Nedbank) is majority owned by pension funds. Should pension funds now sell all Tier II instruments they hold from other banks, and all equity they hold, and only invest in senior debt going forward? That is pension funds should not have invested in Tier II debt does not hold.

Impact of the Tier II proposal in relation to the Bill on SA tax payers and the fiscus:

(a) There is little risk to the South African tax payers from the resolution of ABL, for two reasons:

(i) Firstly, during the 10 March Presentation National Treasury made it clear that ABL is performing well, and collection slightly ahead of expectations. Therefore the loans to be advanced to ABL under the guarantees provided by the SARB, and backed by the National Treasury, are expected to be fully repaid with interest from the collections on the Bad Book which the SARB will be taking as security for the loans.

(ii) Secondly, the separation of the "Good" and "Bad"

		bank creates a structure whereby profits will be reported in Good Bank that would otherwise have been shielded from tax had it accrued in Bad Bank, due to the substantial deferred tax asset which has built up in African Bank (not to mention the benefit the fiscus has derived over the past number of years through the under provisioning of African Bank, and consequent overstatement of taxable income). This will result in Good Bank paying tax to the fiscus in the coming years that would otherwise not have arisen had the profit on the Good assets been earned in the Bad Bank. The deferred tax loss in African Bank currently amounts to between R5bn and R7bn. Therefore the SA tax-payer will gain tax assets of R5bn to R7bn though the demise of African Bank. The submissions from the Tier II Debtholder Committee do not change the above position in any way and will not result in any further cost to the South African tax-payers. **Conclusion** As indicated above, while we acknowledge and agree that a long-term bank resolution framework is required, we cannot accept the current amendments, as long as they include the "No Creditor Worse Off than in Liquidation" principle. We have no objection to the introduction of these amendments to apply prospectively, but we are of the strong view that it is not appropriate, nor constitutional, to include the "No Creditor Worse Off than in Liquidation" principle.	

		Our view is that the curator should be permitted to resolve ABL in a manner that is not intrusive to the constitutional rights of all creditors. In particular, the curator should be allowed to transfer assets subject to the consents of all creditors by way of a scheme of arrangement or compromise, and the Banks Act should be amended to allow for such consent process to be implemented. The Tier II representatives had a meeting with Nation Treasury where we explained our concerns around the constitutionality of the retrospective introduction of the "No Creditor Worse Off than in Liquidation" principle. National Treasury representative indicated that this principle is not essential for the resolution of African Bank and that the deletion thereof from the Bill would be considered. Unfortunately, Tier II representative have been advised recently that due to demands by the other creditors and the curator, the principle will be retained in the next draft of the Bill. These parties have no basis in law to insist on the introduction of this principle in a retrospective manner or at all. We believe the if the Bill is promulgated into law without addressing the submission contained herein, it is highly likely that its validity will be challenged at the highest level necessary to safeguard the rights of investors whose rights will be violated by the consequences of the proposed amendments. In this vein, and in light of the submission contained herein, we request for the formation of a working group, involving the Senior Noteholders, Tier II Noteholders, National Treasury, SARB and the curator of ABL, to debate the way forward on the Bill. We request that the Standing Committee on Finance gives due consideration to the submissions contained herein prior to	

		progressing the Bill.	
Prudential	General	Our major concern with the proposed amendments to the Bill is the virtually unfettered discretion being granted to the curator and to the Minister. The addition of the ability of the curator to transfer the liabilities of the bank negatively impacts on the creditors of the bank, these amendments reduce the creditors' rights as there is no clear participation by creditors in the process. Clarity is required as to the participation in the process by creditors. We believe that the approval process as set out in section 155 of the Companies Act, 2008 ("Companies Act") should be relied upon and that the Bill must be amended to incorporate this approval process. If it is not included, there must be compelling reasons why the protection afforded under the Companies Act is not equally applicable to banks. We understand that time is of the essence, however we believe that the process set out under section 155 of the Companies Act will not be unduly cumbersome and can be followed to achieve a speedy result. Finally, we see the retrospective consequences of subsection (3)*(j)* as being problematic. The amendments allow a curator to expose creditors to consequences that they could not have foreseen when entering into the contract with the bank. The amendments in this subsection will have a detrimental effect on creditors and may lead to a deprivation of property.	The Minister and Curator's discretion is not virtually unfettered as suggested. In fact, the exercise of their discretion is subject to PAJA which is accepted as an appropriate limitation in various other instances. Section 155 of the Companies Act provides for a compromise between a company and its creditors. The Banks Act Amendment Bill ("BAA") does not provide for a compromise of a bank's creditors and therefore the consent process in s155 is not appropriate under the circumstances. National Treasury does, however, believe that it would be useful to introduce a mechanism into the Banks Act to facilitate a compromise between a bank and its creditors and have proposed the inclusion of a further section to the BAA to that effect. A creditors' consent requirement (other than in the case of a compromise proposed by a curator at his/her election in terms of s155 of the Companies Act) is not practical because it may delay or even cause the failure of a proposed rescue of a bank. The amendments proposed to s69(3)(j) by

			the Curator are acceptable to National Treasury. National Treasury further does not believe that s69(3)(j) deprives creditors of their property rights, but even if it does any such deprivation will not be unconstitutional.
Futuregrowth	General	We suggest that this amendment to the Banks Act should be aligned with the current Business Rescue provisions under the existing Companies Act. We support the requirement for amendments to be made to the existing legislation to allow for a more efficient, transparent and fair curatorship process. Our comments and mark-ups are directed at ensuring adequate creditor protection in a manner that is conducive to ensuring fair and equitable treatment of all parties affected by a bank being placed under curatorship.	National Treasury thanks Futuregrowth for the support. While business rescue is not an appropriate resolution mechanism for banks, we do propose that s 155 from the Companies Act be introduced.
Investec Asset Management	General	**Retrospective changes to property rights will hurt pensioners & the whole SA economy** During the Global Financial Crisis (GFC) several governments were forced to use tax-payer money to bail out banks that had over-borrowed and had in turn made bad loans. In a bid to keep the financial system stable, they avoided putting banks into liquidation by injecting capital thus preventing creditors from experiencing any loss. The resultant concern was that debt-holders were inadequately assessing the risks of a bank as they expected governments to bail out such institutions if they got into trouble. **Limiting tax-payer exposure to the banking sector** The Basel III regulations sought to prevent a recurrence of these	National Treasury found this submission difficult to process as: 1. It did not contain any data to substantiate what are quite bold claims. 2. It did not contain any legislative proposals 3. It did not contain specific mention of which of the legislative provisions were being referred to – general comments are made and we don't see the result.

		events. The crux involved finding a mechanism by which banks could be rescued without imposing costs on the tax-payer, this meant providing the Resolution Authority – be that the Finance Minister or the Banks Regulator – with many of the powers they would historically have had under liquidation, under curatorship. Therefore the regulator could restructure a bank while minimising the risks to the financial system. As such, the new style sub-ordinated debt became "bail-in-able". This meant that the regulator could permanently convert the debt to equity or write off at their discretion, once they believed an institution was at or rapidly approaching the Point of Non-Viability. These developments make sense given the events of the GFC. There were several issuances of this new style capital by the big four South African banks through 2014. **Old style Tier II debt had much greater protections than New style Tier II debt** However, old style sub-ordinated debt otherwise known as Tier II debt, issued prior to 2014 that conformed to Basel II is not equivalent to the new style debt. The old style debt enjoys far great protections, as a result, the interest rate investors charged to buy old style debt was notably lower than that charged for new style debt. Such protections include the fact that old style Tier II debt is not bail-in-able and therefore cannot be converted to equity at the election to the regulator. Currently, the payment rights of old style Tier II debt ranks equal with other creditors of a bank prior to liquidation of the bank.	The BAA does not provide for the "bail in" of creditors of any class. It is incorrect to state that the Tier II ranks equal with other creditors in curatorship because unlike the senior debt, Tier II debt cannot become due and payable prior to their maturity date, unless the Registrar of Banks consent thereto and the redeemed Tier II debt is replaced with similar debt instruments when redeemed As mentioned above Tier II debt does not have an equal right to payment outside liquidation. National Treasury are not arguing that curatorship is equivalent to liquidations **National Treasury also differs with Investec Asset Management on their**

		Curatorship is not equivalent to liquidation The Banks Amendment Bill is attempting to nullify these rights of old style Tier II debt-holder – and retrospectively remove their equal right to payment outside of liquidation, effectively treating them as if they are new-style Tier II debt, which they are not. The Treasury is arguing that curatorship is equivalent to liquidation. **Result is losses for pensioners, higher interest rates and lower foreign investment** This is simply not true. The Treasury are attempting to use this piece of legislation to make it retrospectively true. The consequences will be as follows: • Foreign investment will be deterred as investors worry about arbitrary changes to existing property and asset rights. • Funding costs will rise for banks and other companies in South African as investors realise that government is willing to rescind right retrospectively. • The SA economy will ultimately face higher borrowing costs as banks pass through the higher interest rated that they are forced to pay onto consumers and businesses.	**claims regarding the change in instruments – and we highlight that we did not make a proposal in this regard. This proposal was made by the Senior Committee – that submission was also signed by Investec Asset Management.** No property rights are being sacrificed and if any property rights are sacrificed such sacrifice is not unconstitutional.

		• In addition, savers in South Africa, worker in many pension funds, will suffer an unfair loss if this legislation is implemented retrospectively. We support the National Treasury's aim of ensuring a sound financial system with minimal potential costs to the average tax-payer. However this cannot be done in a manner that completely sacrifices the property rights of an asset that was sold under a different legal and economic framework three to six years ago. As a result, we support the solution that has been proposed by the Tier II Debtholder Committee.	
Coronation	1*(a)* Addition to **Section 69(2C)** new *(e), (f), (g) and (h)* of the Banks Act, 1990	We support the intended objective of the proposed amendments to section 69 and, in particular, understand the need for the proposed amendments in the context of the ABIL restructuring. We are, however, concerned that the Banks Amendment Bill will have unintended, prejudicial consequences for liability holders in any other bank restructuring that may take place in the future in that the protection afforded to liability holders will be significantly eroded by certain of the amendments in their current form. In particular, the current proposed wording makes no provision for liability holders to approve: 1) the report generated for the Minister in relation to the proposed disposal of assets and/or transfer of liabilities (the "Transaction") as contemplated in the proposed sub-section (2C)*(c)*. Similarly, if the Transaction does not meet the requirements of sub-section (2C)*(c)*, no approval is required from the liability holders for the Transaction.	Treasury does not support a process where creditor consent is required. The FSB key attributes specifically exclude creditor consent as a requirement. Creditors have adequate protection under PAJA. However, we support the introduction of s155 of the Companies Act as an alternate approach. A number of respondents (the Curator

		2) any funding raised on behalf of a distressed bank as contemplated in the proposed sub-section (2C)*(f)* (being funding other than that provided by the South African Reserve Bank). By making the above matters subject to the approval of liability holders, the Banks Amendment Bill will achieve its intended objective, whilst affording the liability holders the same protection that they enjoy under the current legislation. We set out in section B below, our proposed amendments to sub-section (2C) to cater for the aforementioned approval of liability holders. **Proposed wording:** We have based our proposed wording and amendments to sub-section (2C) on the provisions of the Companies Act which contemplate convening creditor meetings to obtain approval for certain matters in business rescue proceedings. Our proposed wording is as follows: New sub-sections (2C)*(e), (f), (g)* and *(h)* should be inserted reading as follows: *"(e) In addition to the Minister's consent to the disposal of the bank's assets and/or to the transfer of the bank's liability as contemplated in paragraph (d), the curator may not implement such a disposal and/or transfer unless the creditors of the bank have approved the report referred to in paragraph (c) in accordance with the requirements of paragraph (f) below.* *(f) Within 10 business days after submitting the report as provided in paragraph (c) to the Minster and the Registrar,*	included) proposed to limit the source of funding to the Reserve Bank and without affecting existing security rights. Treasury supports this proposal.

		the curator must convene and preside over a meeting of the creditors, called for the purposes of obtaining the creditors' approval of the the report as provided in paragraph (e). In any vote called in terms of this paragraph (f), the report will be considered approved by creditors if – *(i) it was supported by the holders of more than 66.6% of the creditor's voting interests that were voted; or* *(ii) in the event that the effects in paragraph (c) (i) and (ii) are not satisfied, it was supported by the holders of more than 75% of the creditor's voting interests voted; and* *(iii) sufficient creditors were present, personally or represented by proxy, at the meeting representing at least 25% of all the creditor's voting interests that were entitled to be exercised on any matter at the meeting.* *(g) In respect of any meeting convened in terms of paragraph (f), a creditor has a voting interest equal to:* *(i) in the case of a secured or unsecured creditor, the value of the amount owed to that creditor by the bank; and* *(ii) in the case of a concurrent creditor who would be subordinated in a liquidation of the bank, the value of the amount, if any, as independently and expertly appraised and valued by a suitably qualified person at the request of the curator, that the creditor could reasonably expect to receive in such a liquidation of the bank.* *(h)Where a valuation as contemplated in paragraph (g) (ii) has been undertaken:* *(i) the curator must give written notice of valuation to the creditor concerned at least 15 business days before the date of the meeting being convened in terms of*	

		paragraph (f); and *(ii) within 5 business days after receiving a notice of a valuation as contemplated in paragraph (h)(i), a creditor may apply to a court to review, re-appraise and re-value that creditor's voting interest as determined in terms of paragraph (g)(ii)."*	
African Bank CoCom	1*(a)* Addition **Section 69(2C)*(c)*** of the Banks Act, 1990	**Insert:** *"(c) The curator shall not be entitled to implement any proposed disposal and/or transfer in terms of subsection (2C)(b) unless–* *(i) the curator has made available to the creditors of the bank a statement explaining his or her proposal in sufficient detail that such creditors are able to make an informed assessment of the disposal and/or transfer on their respective claim;* **Comment:** This is a reasonable information request in the circumstances. *(ii) claims which would rank pari-passu with each other on a winding-up of the bank under section 68 of this Act are treated equally, provided that this subsection (2C)(c)(ii) shall not apply to the extent that there is a compelling justification for differential treatment;* **Comment:** See FSB Key Attribute 5.1. *(iii) any disposal of assets occurs at the fair market value of those assets; and* *(iv) any transfer of liabilities occurs at the full amount of those liabilities with no amendments to their terms* **Comment:** Assets must be transferred at fair value to ensure	In terms of PAJA a curator is be obliged to do this. See earlier comments about the inappropriateness of a consent process. Senior Counsel suggested that we should not prescribe an alternate administrative procedure as that may limit the creditors' rights. The BAA does not provide for any amendment to the position of creditors as far as their ranking is concerned. A commitment to transfer at fair market value is not practical. In terms of PAJA a transfer of assets will as a minimum requirement have to take place at a reasonable value under the circumstances and will have to be fair to creditors. National Treasury believes that this offers adequate protection to creditors.

		value for the existing entity and minimize the risk of subsequent challenge. The protections afforded by the Insolvency Act are not sufficient as they only apply if and when the existing entity enters liquidation. Liabilities cannot be reduced or amended as part of the transfer.	The BAA does not provide for the transfer of liabilities other than at their full value and with no amendments to their rights.
African Bank CoCom	1(a) Amending **Section 69(2C)(c) and (d)** of the Banks Act, 1990	**Insert:** *"(dc) In seeking consent for such a disposal of assets or transfer of liabilities or such disposal and transfer in terms of paragraph (b)from the Minister in accordance with the provisions of section 54, the curator shall report to the Minister and Registrar, as the case may be, on the expected effect on the bank's creditors and whether—* *(i) the creditors are treated in an equitable manner and claims which would rank pari-passu with each other on a winding-up of the bank under section 68 of this Act would be treated equally; and* *(ii) losses will be borne first by the holders of the bank's equity instruments and subsequently by creditors in a sequence corresponding to the order of priority which would apply on a winding-up of the bank under section 68 of this Act; and* **Comment:** See FSB Key Attribute 5.1. *"(iii) a reasonable probability exists that no a creditor will not incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than such creditor would have been incurred if the bank had been wound up under section 68 of this Act on the date of the proposed disposal, transfer or disposal and transfer.* *(ed) The Minister must, in addition to the requirements of*	The BAA does not introduce any change in the hierarchy of creditors. Agreed that curator can use winding up as comparator to determine ranking of creditors of a bank under curatorship.

		section 54, consider the curator's report as provided in paragraph (d~~c~~) in making his or her decision in terms of section 54: Provided that notwithstanding the fact that the effects in paragraph (d~~c~~)(i), (ii) and (iii) are not ~~satisfied~~achieved, the Minister may, subject to section 54, consent to the disposal, transfer or disposal and transfer if *(i) it is, in his or her opinion, reasonably likely to promote the maintenance of—* *(x~~i~~) a stable banking sector in the Republic; or* *(y~~ii~~) public confidence in the banking sector in the Republic; and.* *(ii) the Minister has made provision for all creditors, to the extent that they would incur greater losses than the losses which they would have incurred if the bank had been wound up under section 68 of this Act, to receive payment of the difference."* **Comment:** See FSB Key Attribute 5.2.	**National Treasury is of the opinion that this section will result in an implicit financial contribution by the fiscus and the constitutionality of such a provision is questionable.**

Prudential	1*(a)* Amending **Section 69(2C)(b),(c),(d)** of the Banks Act, 1990	**(2C)(b) and (d)** Although the Banks Act has specific provisions that deal with a bank that has financial difficulty, we are of the opinion that it is essential for the creditors to be able to vote on the proposal as allowed for in section 155 of the Companies Act. We would accordingly suggest that subsections 69(2C)*(b)* and *(d)* are subject to section 155 of the Companies Act. The proposed wording in the Bill will allow the Minister to differentiate between creditors and disregard the requirement to treat creditors in an equitable manner. The Minister's discretion in this regard is subjective. We are of the opinion that the ability of the Minister to deprive creditors of property (in relation to their rights in a bank under curatorship) may potentially be found to be contrary to the rights contained in the Bill of Rights and may not withstand a constitutional challenge. The uncertainty, in relation to investor's rights, which will arise in the event that this section is kept as proposed, will lead to increased costs of funding for banks. The wording in this section is unclear and we would suggest the amendments set out in Annexure A. *"(2C) (a) Notwithstanding the provisions of subsection (3) and section 51(1)(b), the curator may—* *(i) dispose of any of the bank's assets;* *(ii) transfer any of its liabilities; or* *(iii) dispose of any of its assets and transfer any of its liabilities,* *in the ordinary course of the bank's business.* *(b) Except in the circumstances contemplated in paragraph (a) the curator may not, notwithstanding the provisions of*	Already dealt with above. The Banks Act already empowers a curator to differentiate between creditors (s69(3)(b)). There is no deprivation of property rights in the BAA. NT's view is that the BAA is constitutional. **We support the proposal to introduce s155 of the Companies Act generally and not only where a bank is in curatorship.**

		section 112 of the	The Curator has received legal advice to the effect that a curator is entitled under the Banks Act to differentiate between Tier II creditors and senior creditors. See arguments above. See other comments

		Companies Act— *(i) dispose of any of the bank's assets;* ***[;(ii) effect a disposal referred to in subparagraph (i) unless a reasonable probability exists that such disposal will enable the bank to pay its debts or meet its obligations and become successful concern.]*** *(ii) transfer any of its liabilities; or* *(iii) dispose of any of its assets and transfer any of its liabilities, otherwise than in accordance with the provisions of section 54 of this Act**[;]** and section 155 of the Companies Act.*	regarding ranking of Tier II notes above.
		(2C)(c)(i) We agree with the addition to subsection (2C)*(c)*(i). Creditors must be treated in an equitable manner. *(c) In seeking consent for a disposal of assets or transfer of liabilities or such disposal and transfer in terms of paragraph (b), the curator shall report to the Minister and Registrar, as the case may be, on the expected effect on the bank's creditors and whether—* *(i) the creditors are treated in an equitable manner.~~; and~~*	

		(2C)(c)(ii) In respect of subsection (2C)*(c)*(ii): We would submit that this amendment seeks to treat tier II noteholders issued under pre-Basel III regulations inappropriately in that it seeks to subordinate the holders of these notes at a point in time when they are not so subordinated. This effectively amounts to a retrospective removal of rights. It is for this reason we submit that section 155 of the Companies Act is the appropriate mechanism to ensure that a scheme of compromise with creditors is achieved. We propose that subsection (2C)*(c)*(ii) is deleted. ~~*(ii) a reasonable probability exists that a creditor will not incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up under section 68 of this Act on the date of the proposed disposal, transfer or disposal and transfer.*~~ *(d) The Minister must, in addition to the requirements of section 54, consider the curator's report as provided in paragraph (c) in making his or her decision in terms of section 54: Provided that notwithstanding the fact that the effects in paragraph (c)(i) and (ii) are not satisfied, the Minister may, subject to section 54, consent to the disposal, transfer or disposal and transfer if it is, in his or her opinion, reasonably likely to promote the maintenance of—* *(i) a stable banking sector in the Republic; or* *(ii) public confidence in the banking sector in the Republic~~.~~ and such disposal, transfer, or disposal and transfer has been adopted and approved in accordance with section s55 of the Companies Act"*	

Curator	1*(a)* Amending	**Comment:** The proposed insertion of section 69(2C)*(c)* maintains creditor protection without being unnecessarily stifling for the curator concerned. I support this proposal.	

	Section 69(2C)(c) of the Banks Act, 1990	*"(ii) a reasonable probability exists that ~~a~~no creditor will ~~not~~ incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up under section 68 of this Act on the date of the proposed disposal, transfer or disposal and transfer."*	
Curator	1*(a)* Amending **Section 69(2C)(d)** of the Banks Act, 1990	On the advice of senior counsel, I further suggest removing the guidance given to the Minister or Registrar (as the case may be) in section 69(2C)*(d)*, that the Minister or Registrar should only consent to a transfer or disposal if it is reasonably likely to promote a stable banking sector or public confidence in the banking sector. There is no doubt in my mind that the Minister or Registrar will consider these two factors when deciding whether to consent (so my suggested deletion should not be read as suggesting these factors are not relevant to deciding whether to consent). However, there may be additional factors or alternative factors that are more relevant to consenting to a particular disposal or transfer and the Minster or Registrar should be free to consider these factors as well. My suggested deletion is therefore intended to introduce as much flexibility as possible for the Minister or Registrar so s/he can exercise his or her discretion reasonably (as s/he is already required to do). *"(d) The Minister or the Registrar, as the case may be, must, in addition to the requirements of section 54, consider the curator's report as provided in paragraph (c) in making his or her decision in terms of section 54: Provided that the Minister or the Registrar, as the case may be, may consent to the disposal, transfer or disposal and transfer, 10 notwithstanding*	National Treasury is not in favour of the proposed amendment because it may adversely affect the constitutionality of the BAA.

		the fact that the effects in paragraph (c)(i) ~~and~~or (ii) are not ~~satisfied,~~achieved the Minister may, subject to section 54, consent to the disposal, transfer or disposal and transfer if it is, in his or her opinion, reasonably likely to promote the maintenance of— *(i) a stable banking sector in the Republic; or* *(ii) public confidence in the banking sector in the Republic."*	
Futuregrowth	1*(a)* Amending **Section 69(2C)** of the Banks Act, 1990	We would like to see creditor approval as a requirement prior to any transfer of liabilities (suggested at 66% [by value] approval requirement of that class of creditor). The Curator must provide sufficient information timeously on the reasons, price, terms, conditions, buyer etc. for any sale/transfer of liabilities to enable an informed vote by all creditors. As a sale will materially impact creditor rights, risk and obligations, we believe that any transfer of liabilities needs to be done with at least a 66% (by value) approval from that class of creditors. Explanatory statement to be issued to creditors by curator setting out the results of such a vote. We would request that the Report to the Minister to be made available to creditors prior to the submission to the Minister. We would also request that creditors have an opportunity to query aspects of the Report prior to its submission to the Minister and that the curator/Minister provides information/answers to questions that we may rise. Assets and liabilities must be transferred at fair market value. *"(c) In seeking consent for a disposal of assets or transfer of liabilities or such disposal and transfer in terms of paragraph*	See comments above A curator is obliged to do this under his PAJA obligations. This could draw out the process too long and the bank may fail in the interim. PAJA offers creditors adequate protection.

		(b), the curator shall report to the Minister and Registrar, as the case may be, on the expected effect on the bank's creditors and whether— *(i) the creditors are treated in an equitable manner;~~and~~* *(ii) a reasonable probability exists that a creditor will not incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up under section 68 of this Act on the date of the proposed disposal, transfer or disposal and transfer;* *(iii) the report must be made available to the affected class of creditors prior to its submission to the Minister; and* *(iv) the Curator must provide the affected class of creditors with a reasonable amount of time to query any items in the report.* *(d) The Minister must, in addition to the requirements of section 54, consider the curator's report as provided in paragraph (c) in making his or her decision in terms of section 54: Provided that notwithstanding the fact that the effects in paragraph (c)(i) and (ii) are not satisfied, the Minister may, subject to section 54, consent to the disposal, transfer or disposal and transfer if it is, in his or her opinion, reasonably likely to promote the maintenance of—* *(i) a stable banking sector in the Republic; or* *(ii) public confidence in the banking sector in the Republic.* *(e) The bank may only transfer liabilities in the manner contemplated in paragraph (a) and (b) subject to the approval of the affected class of creditors* *(i) Approval can only be granted should 66% (by*	

		value) of that class of creditor vote in favour of such a transfer; *(ii) The Curator must timeously provide the affected class of creditors with sufficient information to enable them to make an informed decision; and* *(iii) The Curator must issue an explanatory note to the affected class of creditors informing them as to whether the transfer of liabilities, as contemplated in paragraphs (a) and (b) has been approved.* *(e) Assets and liabilities must be transferred, as contemplated in paragraphs (a) and (b) at fair market value."*	
Stanlib	1*(a)* Amending **Section 69(2C) *(a),(b),(c)* and*(d)*** of the Banks Act, 1990	**Comments on the proposed amendments to Section 69(2C) of the Banks Act, 1990** ***The proposed amendments afford the curator and the Minister powers to make an unacceptable differentiation in the treatment of creditors:*** If the Bill were to be enacted, Section 69(2C)*(b)* of the Banks Act, 1990 (Banks Act) would allow a curator to" (i) dispose of any assets of the bank under curatorship; (ii) transfer any of the liabilities of the bank under curatorship; or (iii) dispose of any of the assets and transfer any of the liabilities of the bank under curatorship, other than in the ordinary course of business, provided the Minister of Finance (Minister) consents hereto. The Minister may, in terms of the proposed Section 69(2C)*(d)*, grant such approval if he consider the disposal, transfer, or disposal and transfer "*reasonably likely*" to promote a stable	See comments above.

		banking sector in South Africa or to maintain public confidence in the South African banking sector. The proposed amendments to Section 69(2C)*(b)* of the Banks Act effectively empower the Minister and the curator to differentiate in how creditors are dealt with on an ad hoc and subjective basis by treating some creditors less favourably than others. These amendments would afford the Minister powers which are too wide-ranging, without sufficient scope for measuring whether they are equitable, fair and reasonable. For this reason we submit that these proposed amendments are unacceptable, and should be subject to the types of checks and balances contemplated in section 155 of the Companies Act. Moreover to suggest that the benchmark and time of measurement should be that "*a reasonable probability exists that a creditor will not incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been would up under section 68 if this Act in the date of the proposed disposal, transfer or disposal and transfer*", does not have sufficient regard to the fact that: 1) The terms of such disposal and/or transfer may itself be inequitable; and 2) The time to make his measurement (which we don't believe is appropriate in any event) is actually at the date on which the bank is placed under curatorship, since that is when the view is being taken that creditors are better off with the bank under curatorship.	Creditors will have protection under PAJA. It is impossible to use the date of curatorship as the measurement date unless the disposal transaction's terms are also final on that date. **As noted in the accompanying submission on the impact of bank funding costs, it is our view that these will be small.** See comments above

		Our proposed amendments are intended to limit the aforementioned powers. ***The proposed amendments could result in increased bank funding costs, with adverse knock-on effects for bank clients and the South African economy:*** The proposed powers of the curator and the Ministers to: • Make an unacceptable differentiation in the treatment of different creditors; and • Deprive the bank creditors of their existing property rights, Introduces considerable uncertainty in the relation to creditors' rights upon a bank being placed under curatorship, and will likely result in an increased cost of funding for the South African banks going forward. The banks will pass these costs to their clients, with likely adverse effects for the South African economy. This increase in banks' cost of debt capital could have an adverse detrimental impact on the Banks Acts' objective of ensuring a stable banking sector in the south Africa, and could furthermore erode public confidence in the south African banking sector. ***The proposed amendments could result in an adverse impact on the phasing-in regulations introduced to phase-in Basel III:*** The Basel III global bank regulatory standards proposed by the Basel Committee on Banking Supervision were implemented in South Africa on 1 January 2013 by effecting amendments to the Regulations Relating to Banks (Regulations). Regulations 34(14)(b) (i) and (ii) of the Regulations provide that the	No uncertainty is created **as the costs are small.** **The proposal is to transfer liabilities; it is not to write off or reduce liabilities.**

		proceeds of instruments issued prior to 1 January 2013 (and which therefore do not meet with the Basel III regulatory capital requirements including ability of the Registrar of Banks to write-off or convert a regulatory capital instrument) still count as regulatory capital of the issuer subject to the regulatory capital phase out for such instruments contained in Regulation 38(14)(c) of the Regulations. If one has regard to the aforegoing, then authorising the Minister to write-off debt of a bank (owed to creditors under instruments predating 1 January 2013) placed under curatorship, where the proceeds of the debt issuance in question counted towards the bank's regulatory capital, would be contrary to the principles contained in Regulation 38(14)(b) of the Regulations which deal with the phasing in of Basel III. "*(2C) (a) Notwithstanding the provisions of subsection (3) and section 51(1)(b), the curator may—* *(i) dispose of any of the bank's assets;* *(ii) transfer any of its liabilities; or* *(iii) dispose of any of its assets and transfer any of its liabilities,* *in the ordinary course of the bank's business.* *(b) Except in the circumstances contemplated in paragraph (a) the curator may not, notwithstanding the provisions of section 112 of the Companies Act—* *(i) dispose of any of the bank's assets;* ***[;(ii) effect a disposal referred to in subparagraph (i) unless a reasonable probability exists that such disposal will enable the bank to pay its debts or meet its obligations and become successful concern.]***	The BAA does not provide for a transfer of liabilities with amended terms or any change in ranking.

		(ii) transfer any of its liabilities; or *(iii) dispose of any of its assets and transfer any of its liabilities,* *otherwise than in accordance with the provisions of section 54* *of this Act and section 155 of the Companies Act**[;]**.* *(bA)For the avoidance of doubt, any transfer of liabilities in terms of paragraphs (a) or (b) above shall be a transfer of all the liabilities of the bank which rank the same payment outside of a winding up of the bank* *(c) In respect of any ~~seeking consent for a~~ disposal of assets or transfer of liabilities or such disposal and transfer in terms of paragraph (b), the curator shall report to the Minister and Registrar, as the case may be, on the expected effect on the bank's creditors and whether—* *~~(i)~~ the creditors are treated in an equitable manner~~;~~* *~~and~~* *~~(ii) a reasonable probability exists that a creditor will not incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up under section 68 of this Act on the date of the proposed disposal, transfer or disposal and transfer.~~* *(d) The Minister must, in addition to the requirements of section 54, consider the curator's report as provided in paragraph (c) in making his or her decision in terms of section 54: Provided that notwithstanding the fact that the effects ~~in paragraph (c)(i) and (ii) are not satisfied,~~ of the disposal, transfer or disposal and transfer, will be*	Adequate protection is afforded to creditors under PAJA. **National Treasury agrees to introducing section 155 of the Companies Act as an additional mechanism.** See comments above

		that creditors are to be treated inequitably, the Minister may, subject to section 54, consent to the disposal, transfer or disposal and transfer if it is~~, in his or her opinion,~~ reasonably likely to promote the maintenance of— *(i) a stable banking sector in the Republic; ~~or~~* *(ii) public confidence in the banking sector in the Republic~~.~~;* *(iii) the person or entity to which the disposal of assets or transfer of liabilities or such disposal and transfer is to be made is a going concern and has a reasonable possibility of paying its debts and meeting all obligations in respect of any liabilities so transferred; and* *(iv) and such disposal, transfer, or disposal and transfer has been adopted and approved in accordance with the provision of section 155 of the Companies Act.*"	
Tier II Committee	1*(a)* Amending **Section 69(2C) *(a),(b),(c)***	**Differentiation between Creditors** If the Bill were to be enacted, Section 69(2C)*(b)* of the Banks Act, 1990 (Banks Act) would allow a curator to"	

	and*(d)* of the Banks Act, 1990	(iv) dispose of any assets of the bank under curatorship; (v) transfer any of the liabilities of the bank under curatorship; or (vi) dispose of any of the assets and transfer any of the liabilities of the bank under curatorship, other than in the ordinary course of business, provided the Minister of Finance (Minister) consents hereto. The Minister may, in terms of the proposed Section 69(2C)*(d)*, grant such approval if he consider the disposal, transfer, or disposal and transfer "*reasonably likely*" to promote a stable banking sector in South Africa or to maintain public confidence in the South African banking sector. The proposed amendments to Section 69(2C)*(b)* of the Banks Act accordingly authorise the curator and the Minister, unjustifiably in Tier II Debtholder Committee's view, to differentiate between creditors on an ad hoc and subjective basis by treating some creditors less favourably than others. Our concerns here may be address by incorporating into the Bill a similar provision to the compromise provision in section 155 of the Companies ACT, 2005 (Companies Act). **Deprivation of Existing Property Rights** The contractual rights held by creditors in relation to a bank under curatorship are regarded as "*property*" within the meaning of the Constitution. In our submission, the proposed amendment to Section 69(2C) of the Banks Act authorise a deprivation of existing property right on an ad hoc basis at the discretion of the curator and (indirectly) of the Minister. This deprivation of property is not	The BAA does not empower a curator to differentiate between creditors. S69(3)(b) already grants this power to a curator. See comments above See comments above

		rationally connected to the purpose of promoting confidence in, or the stability of, the banking sector in South Africa. Further it is our submission that the rights afforded to the curator and the Minister are disproportionate to the end sought to be achieved as the provisions are broadly framed and thus afford the curator and the Minister a virtually unfettered discretion to decide when and in what manner to deprive a creditor of its rights. **Increased cost of funding** Linked to the differentiation between creditors and the deprivation of existing property rights as discussed above, is the fact that the uncertainty in relation to creditors' rights upon the curatorship of a bank as a consequence of the proposed amendments to section 69(2C) of the Banks Act will likely result in an increased cost of funding for South African banks going forward. This may have a detrimental impact on the object to ensure a stable banking system in South Africa and could further erode public confidence in the South African banking sector. We submit that our proposed amendments will address this uncertainty such that, if our amendments are incorporated into the Bill, this should not have any material increase in the cost of funding for South African banks. **Comparative Analysis with Basel III** The Basel III global regulatory standard proposed by the Basel Committee on Banking Supervision was implemented in South Africa on 1 January 2013 by amendment to the Regulation Relating to Banks (Regulations). Regulations 38(14)(b)(i) and (ii) of the Regulations provide that the proceeds of instruments issued prior to 1 January 2013 (and which thus do not meet with the Basel II regulatory capital requirements including the ability of the Registrar of Banks to write off or convert a regulatory	National Treasury believes this to be a highly selective interpretation. There are many contributory factors in determining cost of funding (COF) in the banking sector. These factors can both increase and reduce COF, but these considerations are separate from public policy considerations with respect to what is appropriate for the banking sector in general. For instance, SA banks have long operated under an implicit government guarantee derived from centrality of the banking sector in the wider economy and costs of bank failure. NT in the form of the BAA seeks to ensure increased resolvability of banks, which would lower fiscal risks, the implicit guarantee and raise COF. This increase in costs is exactly equal to lower public costs and reflects. This impact is distributive passing the costs of bank failure from public sector to private sector, which is consistent with international best practice. The phasing in timelines are maximum

		capital instrument) still count as regulatory capital for the issuer subject to the regulatory capital phase out for such instruments contained in Regulation 38(14)(c) of the Regulations. As such, authorising the Minister to effectively to write off debt, the proceeds of which counted toward the regulatory capital of a bank under curatorship and which debt is owed to certain creditors under instruments predating 1 January 2013, would be contrary to the principles dealing with the phasing in of Basel III as contained in Regulations 38(14)(b) of the Regulations. We submit that our proposed amendments will address this conflict with Basel III. **Cherry Picking** The proposed amendments to section 69(2C) of the Banks Act would allow a curator, with the consent of the Minister, to dispose of any assets and/or transfer any liabilities of a bank under curatorship. These proposed powers would authorise the curator (and, indirectly, the Minister) to decide, on an ad hoc basis, which assets he or she wishes to dispose of and /or which liabilities he or she wishes to transfer. In our submission, the curator should not be allowed to "*cherry pick*" which liabilities can be transferred. Outside of a winding up of the Bank, the curator should be required to transfer all liabilities which rank the same for payment, if any liabilities are to be transferred. **Objects of Curatorship** One of the objects of curatorship is, as currently expressed in section 69(2D) of the Banks Act, to enable the bank to pay its debt or meet its obligations and become a successful concern. The proposed amendments to section 69(2C) of the Banks Act would allow a curator, with the consent of the Minister, to dispose of assets and/or transfer liabilities to an entity	permissible timeframes for Basel III. NT believes that international consensus, supported by all parties- on the need for the proposed reform speaks to the need and appropriateness of BAA. However, then desire to stall implementation until maximum implementation dates to allow for narrow commercial interest at the possible expense to both tax payers and financial stability runs counter to NT's public welfare focus.

		(Transferee) without the requirement that such Transferee be a going concern. Allowing a transfer to occur in such circumstances is contrary to the objects of the curatorship. We submit that the ability of the curator to dispose of assets and/or transfer liabilities should be subject to the condition that the Minister is satisfied that the Transferee is a going concern or has a reasonable probability of becoming a going concern in order to satisfy all the obligations transferred to it. **Comparator Principle** If enacted, the proposed amendments to section 69(2C) of the Banks Act would require the curator in his or her report to state whether or not there is a reasonable probability that a creditor will not incur greater losses on the date of the proposed disposal of assets and/or transfer liabilities than it would have been exposed to on a winding up. This amendment effectively imports a comparator principle into section 69 of the Bank Act, by requiring the curator to compare the position of a creditor of a bank under curatorship with the position of a creditor of a bank in a winding up. Curatorship of a bank is not akin to the winding up of a bank, as section 69(2D) if the Banks Act makes clear, and the two situations are not appropriately compared with one another, it is our submission that incorporating the comparator principle into the proposed amendments to section 69(2C) of the Banks Act would be inimical to the purpose of curatorship. To the extent that support for the proposed amendment is sought to be found in s69(3)*(b)* of the Banks Act, we submit that that provision authorises a curator to make payments to any creditor	Adequate protection for creditors under PAJA. See comments above. Minister and a curator will be obliged to do this under PAJA. The liquidation comparator is the only comparator a curator can use when assessing whether his actions will be for the benefit of creditors and whether he is treating creditors fairly.

		or creditors of the bank in whatever order that he or she deems fit, and thus allows a curator to decide which creditor to pay in the ordinary course of the bank's business from a commercial perspective. It does not incorporate the comparator principle into the Banks Act. It is our submission that this amendment should be deleted. Please see our proposed amendments to the Bill: *"(2C) (a) Notwithstanding the provisions of subsection (3), the curator may—* *(i) dispose of any of the bank's assets;* *(ii) transfer ~~any of~~ its liabilities; or* *(iii) dispose of any of its assets and transfer ~~any of~~ its liabilities,* *in the ordinary course of the bank's business.* *(b) Except in the circumstances contemplated in paragraph (a) the curator may not, notwithstanding the provisions of section 112 of the Companies Act—* *(i) dispose of any of the bank's assets;* ***[;(ii) effect a disposal referred to in subparagraph (i) unless a easonable probability exists that such disposal will enable the bank to pay its debts or meet its obligations and become successful concern.]*** *(ii) transfer ~~any of~~ its liabilities; or* *(iii) dispose of any of its assets and transfer any of its liabilities, otherwise than in accordance with the provisions of section 54of this Act and subsection (11) below**[;]**.* *(bA)For the avoidance of doubt, any transfer of liabilities in terms of paragraphs (a) or (b) above shall be a transfer of all the liabilities of the bank which rank the same payment outside of a winding up of the bank*	There is nothing in the Banks Act which limits the application of s69(3)(b) to payments in the ordinary course of business.

		(c) In ~~seeking consent for a~~ respect of any disposal of assets, ~~or~~ transfer of liabilities or such disposal and transfer in terms of paragraph (b), the curator shall report to the Minister and Registrar, as the case may be, on the expected effect on the bank's creditors and, in particular, whether— *~~(i)~~ the creditors are to be treated in an equitable manner~~; and~~* *~~(ii) a reasonable probability exists that a creditor will not incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up under section 68 of this Act on the date of the proposed disposal, transfer or disposal and transfer~~.* *(d) The Minister must, in addition to the requirements of section 54, consider the curator's report as provided in paragraph (c) in making his or her decision in terms of section 54: Provided that notwithstanding the fact that the effect of the disposal, transfer or disposal and transfer will be that creditors are to be treated inequitably~~s in paragraph (c)(i) and (ii) are not satisfied~~, the Minister may, subject to section 54, consent to the disposal, transfer or disposal and transfer if it is~~, in his or her opinion,~~ reasonably likely to promote the maintenance of—* *(i) a stable banking sector in the Republic; or* *(ii) public confidence in the banking sector in the Republic.* *(iii) the person or entity to which the disposal of assets or transfer of liabilities or such disposal and transfer is to be made is a going concern and has a reasonable*	

		possibility of paying its debts and meeting all obligations in respect of any liabilities so transferred; and *(vi) such disposal, transfer or disposal and transfer has been adopted and approved in accordance with subsection (11) below."*	
Coronation	1*(b)* Amending **Section 69(3)*(f)*** of the Banks Act, 1990	We note that it is proposed that subsection (3)*(f)* be substituted with a new subsection (3)*(f)* which would allow the curator to make decisions on behalf of a bank's corporate shareholders in respect of matters that currently require the approval of such corporate shareholders. When one considers the types of transactions that would typically require the approval of the bank's corporate shareholders under the Companies Act 71 of 2008 (the "Companies Act"), these would be material and significant transactions. We are therefore concerned that corporate shareholders, who should be given an opportunity to consider and vote on such material and significant transactions, would effectively be excluded from the process. In our view, convening a corporate shareholders meeting to obtain the required approvals would not unduly delay the curator's process and one would expect shareholders to vote in favour of transactions that make commercial sense. Given the material and far-reaching in-road on the rights of shareholders resulting from the proposed amendment, and in the absence of a more detailed explanation as to why the amendment is being sought, we, with respect submit that the proposed amendment to subsection (3)*(f)* dealing with this aspect be removed.	The Banks Act currently allows a curator to pass resolutions, which would otherwise have required a special resolution of shareholders. The intention is therefore clearly that the shareholders of a bank should not be able to frustrate a curator in the exercise of his/her powers. S69(3)(f) is unfortunately not wide enough to deal with situations where the shareholders of a bank's holding company will have the right (in terms of the Companies Act or the Listings Requirements of the JSE) to approve the exercise of a power by a curator. The proposed amendment will remove this right of a bank holding company's shareholders in line with the purpose of the current s69(3)(f).
Futuregrowth	1*(b)*	We would like clarity on the removal of the phrase "*in the course of the curator's management of the bank concerned*", as we do not understand the rationale of this deletion. Our view is	It is arguable that the disposal of the whole or the greater part of a bank's assets or undertaking does not form part of the

	Amending **Section 69(3)*(f)*** of the Banks Act, 1990	that this phrase should not be deleted.	management of a bank and it is therefore proposed that the phrase be deleted to avoid any doubt about whether a curator has the relevant power.
Curator	1*(b)* Amending **Section 69(3)*(f)*** of the Banks Act, 1990	The proposed amendment to section 69(3)*(f)* allows a curator to make decisions in respect of a failed bank placed under curatorship, which would ordinarily require the approval of the shareholders of the bank's holding company. This proposal is made so that the curator is not prevented from performing his or her duties by shareholders of the bank's holding company, whose interests may naturally conflict with the objectives of the curatorship. I support this proposed amendment as, given the holding structure of all registered banks in South Africa (that is, where the public holds shares in a holding company and not directly in a bank), the existing section 69(3)*(f)* does not enable the Minister to empower the curator in the manner that the legislature originally intended.	
Coronation	1*(d)* Amending **Section 69(3)*(j)*** of the Banks Act, 1990	The proposed new paragraph *(j)* that will be inserted as a subsection to subsection 69 (3) should be amended as follows and a new paragraph *(k)*, *(l)* and *(m)* should be inserted reading as follows: *"(j) to raise funding from the South African Reserve Bank on behalf of the bank and, notwithstanding any contractual obligations of the bank, to provide security over the assets of the bank in respect of such funding: Provided that, notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be*	National Treasury supports this comment

		instituted against the bank after the expiration of a period of one year as from the date of such provision of security. *(k) to raise funding from any person other than the South African Reserve Bank on the same basis as set out in paragraph (j): Provided that the creditors of the bank have approved such funding at a meeting of the creditors convened and presided over by the curator for this purpose. In any vote called in terms of this paragraph (k), the funding will be considered approved by creditors if –* *(i) it was supported by the holders of more than 75% of the creditor's voting interests voted; and* *(ii) sufficient creditors were present, personally or represented by proxy, at the meeting representing at least 25% of all the creditor's voting interests that were entitled to be exercised on any matter at the meeting.* *(l) In respect of any meeting convened in terms of paragraph (k), a creditor has a voting interest equal to:* *(i) in the case of a secured or unsecured creditor, the value of the amount owed to that creditor by the bank; and* *(ii) in the case of a concurrent creditor who would be subordinated in a liquidation of the bank, the value of the amount, if any, as independently and expertly appraised and valued by a suitably qualified person at the request of the curator, that the creditor could reasonably expect to receive in such a liquidation of the bank.* *(m) Where a valuation as contemplated in paragraph (l) (ii) has been undertaken:*	National Treasury is not in favour of this further amendment for the current draft. Consideration will be given to the proposal during the Resolution Bill process as it may well be a good idea to allow for post-curatorship funding.

		(i)the curator must give written notice of valuation to the creditor concerned at least 15 business days before the date of the meeting being convened in terms of paragraph (k); and *(ii) within 5 business days after receiving a notice of a valuation as contemplated in paragraph (m)(i), a creditor may apply to a court to review, re-appraise and re-value that creditor's voting interest as determined in terms of paragraph (l)(ii).*"	
African Bank CoCom	1*(d)* Amending **Section 69(3)*(j)*** of the Banks Act, 1990	*"(j) to raise funding on behalf of the bank and, notwithstanding any contractual obligations of the bank, to provide security over the assets of the bank in respect of such funding: Provided that -* *(i) notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank ~~after the expiration of a period of one year as from~~following the date of such provision of security;* **Comment**: It is not clear to us why one year must elapse before it becomes possible to bring a claim. *(ii) there is no reasonable prospect of the curator obtaining unsecured funding;* *(iii) secured funding may only be raised where there is a reasonable prospect that such funding would preserve or enhance the value of the claims of the existing creditors of the bank;* *(iv) the principal commercial terms of any agreement to make available any secured funding to the bank are publicly disclosed by the curator prior to such agreement taking*	National Treasury is not in favour of the proposed amendment because it will unnecessarily constrain a curator who may have to raise funds on an urgent basis. PAJA and the amendments to the section proposed by the Curator afford adequate protection to creditors.

		effect; *(v) any security granted in connection with such funding may be granted only over specifically identified assets, the value of which, at the time the security is granted, shall not materially exceed the net amount of the secured debt; and* ~~*(i)*~~*(vi) no funding may be secured by any assets of the bank unless such funding is provided by the Reserve Bank*." **Comment**: These amendments are designed to protect the position and ranking of existing senior creditors.	
FirstRand	1*(d)* Addition **Section 69(3)*(j)*** of the Banks Act, 1990	We are not supportive of the proposed addition in subsection (3), proposed as section 69(3)*(j)*. We respectfully wish to submit that the South African Reserve Bank's current role and responsibilities as lender of last resort together with its envisaged role, responsibilities and powers in relation to financial stability in terms of the draft Financial Sector Regulation Bill, 2014 (10 December 2014), is adequate for purposes of securing additional funding against the pledge of collateral by a failed bank. The proposed addition will not only allow for a practice which may be undesirable in respect of existing and future contractual funding arrangements between banks and the professional/wholesale market, but we believe that the raising of funds from the public (mainly the interbank market and/or the professional/wholesale market) in respect of a failed bank, against security or the pledging of the failed bank's assets which may already be severely depreciated to a small face amount, will possibly be done under adverse market conditions and at an undesirable cost. It may also be detrimental to confidence in the banking sector in general and contrary to the interest of unsecured depositors and creditors, especially in cases of liquidations where unsecured depositors and creditors will	The Financial Sector Regulation Bill, 2014 (10 December 2014) will in all likelihood not be passed in time to address the requirements of the African Bank curatorship or any other curatorship that may occur before it is passed into law.

		rank subordinated to the secured depositors and creditors. it will be important that careful consideration be given to whether the said proposed amendments will be consistent with the provisions and resultant interpretation, object and administration of the Financial Sector Regulation Act, 2014 (currently published as the Financial Sector Regulation Bill (10 December 2014), especially insofar as schedule 4 in respect of required amendments to the Act are concerned.	
Curator	1*(d)* Addition **Section 69(3)*(j)*** of the Banks Act, 1990	The addition of section 69(3)*(j)* allows a curator to raise funds from either the SARB, or any entity under its control, and to provide security over the assets of the bank under curatorship in respect of such funding without prejudicing the existing real security rights of any creditor of the bank. The curator's ability to raise funds is essential to the successful resolution of any failed bank placed under curatorship. I accordingly support the proposal: "*(d) (by the addition in subsection (3) of the following paragraph:* *"(j) to raise funding from the Reserve Bank, or any entity controlled by the Reserve Bank, on behalf of the bank and, notwithstanding any contractual obligations of the bank, but without prejudice to existing real security rights, to provide security over the 40 assets of the bank in respect of such funding: Provided that, notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of 45 such provision of security."* "	National Treasury supports the proposed amendments

Futuregrowth	1*(d)* Addition **Section 69(3)*(j)*** of the Banks Act, 1990	It is our suggestion that the raising of funding and provision of security must be effected with due consideration given to the bank's existing contractual obligations (in order to protect existing creditors) and that the following phrase be removed from the first sentence "*notwithstanding any contractual obligations of the bank*". It is our suggestion that any claim for damages should be permitted at any point in time and not only after an expiration of one year. This subsection needs to be clearer and stipulate that it only applies to funding raised from National Treasury and/or the SARB over unencumbered assets and that it does not have an effect on assets that are already secured or if there are limits in terms of other agreements. "*(j)to raise funding on behalf of the bank from National Treasury and/or the SARB and~~, notwithstanding any contractual obligations of the bank,~~ to provide security over any unencumbered ~~the~~ assets of the bank in respect of such funding~~: Provided that, notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provision of security.~~*"	See comments above The proposed amendment will make this section inconsistent with the other sections in s69(3). National Treasury supports the proposal that the funding is limited to the Reserve Bank.
Prudential	1*(d)* Addition **Section 69(3)*(j)*** of the	We do not agree with the additions proposed in this subsection. The retrospective effect of this provision may be found to be unfairly prejudicial and will impact on the cost of funding going forward. The proposed wording in the Bill may amount to a deprivation of property in that it seems t disregard current secured creditors and their security over the assets of the bank.	See above – National Treasury supports the proposal that the funding is limited to the Reserve Bank.

	Banks Act, 1990	We are of the opinion that this may not withstand a constitutional challenge unless the arrangements proposed under this subsection are approved by creditors in terms of section 155 of the Companies Act. We would accordingly suggest that subsection 69(3)*(j)* is amended to allow for creditors to approve any such arrangement in terms of section 155 of the Companies Act. An alternative suggestion is that the scope of this section is limited to only cover funding from the South African Reserve Bank and the security granted should be limited to the unsecured assets of the bank. "***(3)*** *The Minister may, in the letter of appointment or at any time subsequent thereto, empower the curator in his or her discretion, but subject to any condition which the Minister may impose and notwithstanding section 51(1)(b)-* … *(j) to raise funding from the South African Reserve Bank on behalf of the bank and, notwithstanding any contractual obligations of the bank, to provide security over ~~the~~any assets of the bank in respect of such funding to the extent that they are not otherwise unencumbered: Provided that notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provisions of security.*" Or alternatively "*(j) to raise funding on behalf of the bank and, notwithstanding any contractual obligations of the bank, to provide security over the assets of the bank in respect of such*	

		funding: Provided that ~~notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provisions of security~~such arrangement has been adopted in accordance with section 155 of the Companies Act."	
Stanlib	1*(d)* Amending **Section 69(3)*(j)*** of the Banks Act, 1990	**Proposed Amendments to section 69(3)*(j)* of the Banks Act, 1990** ***The proposed amendments could result in an adverse retrospective impact on the rights of creditors, which creditors would have priced for this eventuality had it been a possibility at the time of their initial investment***: To the extent that the contractual arrangements between a bank and its creditors contains a negative pledge prohibiting the bank from encumbering its assets, the proposed enactment of amendments to section 69(3)*(j)* of the Banks Act, potentially empowers a bank curator to expose its creditors to unforeseen consequences that would not have been contemplated at that time when they executed their contractual relationship with the bank under curatorship. The aforementioned proposed amendments to section 69(3)*(j)* of the banks Act will therefore have a detrimental impact on the rights of creditors of a bank placed under curatorship because such creditors would in all likelihood have accounted for these potential retrospective consequences in their initial pricing demands, had they anticipated the possibility of the negative	See comments above

		pledge provisions being overridden at the time that they contracted with the bank in question. In fact, this retrospective impact on the risks assumed by the banks senior unsecured creditors is the same argument accepted by the South African Reserve Bank when bond market investors argued (a few years ago) against promulgation of legislation that would have allowed banks to issue so-called "covered bonds" (i.e. bonds secured by a pool of mortgage loans as collateral). Our proposed amendments to the Bill, h are intended to limit the aforementioned powers. ***The proposed amendments could result in the deprivation of creditors' existing property rights:*** The proposed amendments to section 69(3)*(j)* of the Banks Act would allow the curator to override the contractual rights of the bank's creditors. It is submitted that the aforementioned powers could potentially result in the unconstitutional deprivation of creditor's property rights on the basis of the same arguments discussed in paragraph (error of referencing in letter). Our proposed amendments to the Bill are intended to limit the aforementioned powers. ***The proposed amendments could result in increased banking funding costs, with adverse knock-on effects for bank clients and the South African economy****:* Since the proposed amendments to section 69(3)*(j)* of the Banks	**See National Treasury's response document which sets out calculations indicating that the costs of the change are very small.**

		Act allow a curator to expose creditors to unforeseen consequences that could not have been contemplated by them at the time when they initially entered into their contractual relationship with the bank under curatorship, this will likely result in an increased cost of funding for South African banks going forward. An increase in bank funding costs will have adverse knock-on effects for banks' clients and ultimately prove erode public confidence in banks generally and prove detrimental for the Banks Act objective of ensuring a stable banking sector in South Africa. *" (d) (by the addition in subsection (3) of the following paragraph:* *"**(3)** The Minister may, in the letter of appointment or at any time subsequent thereto, empower the curator in his or her discretion, but subject to any condition which the Minister may impose and notwithstanding section 51(1)(b)-* *..."(i) to cancel any guarantee issued by the bank concerned prior to its being placed under curatorship, excluding such guarantee which the bank is required to make good within a period of 30 days as from the date of the appointment of the curator: Provided that~~, notwithstanding the provisions of subsection (6), a claim for damages in respect of any loss sustained by or damage caused to any person as a result of the cancellation of a guarantee in terms of this paragraph, may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation~~ such arrangement has been adopted and*	

		approved in accordance with section 155 of the Companies Act; ***[.]****; and* *(j) to raise funding on behalf of the bank and, notwithstanding any contractual obligations of the bank, to provide security over the assets of the bank in respect of such funding: Provided that, notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provision of security.".*	
Tier II Committee	1*(d)* Amending **Section 69(3)*(j)*** of the Banks Act, 1990	**Retrospectivity** The proposed amendments to Section 69(3)*(j)* of the Banks Act, if enacted, would allow a curator to expose creditors to new consequences that they could not have foreseen at the time when they entered into their contractual relationship with the bank under curatorship. To the extent that such contractual arrangements contain a negative pledge on the bank encumbering its assets. This will have a detrimental impact on creditors of a bank under curatorship because such creditors would have accounted for these retrospective consequences in their pricing, had they been anticipated at the time the contract with the bank was entered into. We believe that our proposed amendments will address this issue. **Deprivation of Existing Property Rights** The proposed amendments to Section 69(3)*(j)* if the Banks Act would allow the curator to override the contractual rights of the	See comments above See comments above

		banks' creditors. In our submission, this would give rise to an unconstitutional deprivation of existing property rights on the basis of the same arguments as discussed in paragraph "*Deprivation of Existing Property Rights*" above. In our submission, these concerns may be addressed by incorporating into the Bill a similar provision to the compromise provision contained in section 155 of the Companies Act **Increased cost of funding** As the proposed amendments to section 69(3)*(j)* if the Banks Act allow a curator to expose creditors to new consequences that they could not have foreseen at the time when they entered into their contractual relationship with the bank under curatorship, this will likely result in an increased cost of funding for South African banks going forward, this may have a detrimental impact on the object to ensure a stable banking sector in South Africa and could further erode public confidence in the South African banking sector. We submit that our proposed amendments will address this uncertainty, such that if our amendments are incorporated into the Bill, this should not have any material increase in the cost of funding for south African banks. Please see our proposed amendments to the Bill: "*(d) (by the addition in subsection (3) of the following paragraph:* *"(j) to raise funding on behalf of the bank and, notwithstanding any contractual obligations of the bank, to provide security over the assets of the bank in respect of such funding: Provided that such arrangement has*	**See cover document.**

		been adopted and approved in accordance with subsection (11) below.~~, notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provision of security.~~"	
African Bank CoCom	Amending **Section 69(6A)** of the Banks Act, 1990	"***(6A)*** *While a bank is under curatorship the curator shall on a monthly basis furnish the Registrar with a written report containing an exposition of the affairs of the bank concerned and in which it is stated whether or not, in the opinion of the curator, a reasonable probability exists that the bank will be able to pay its debts ~~or to meet its obligations~~ and to become a successful concern.*" **Comment**: This provision may benefit from further drafting to distinguish situations where the existing bank becomes able to pay its debts and exits curatorship from those (such as ABL) where a restructuring produces a new "Good Bank" entity.	It is not proposed that this section be amended.
African Bank CoCom	PAJA Remedies inappropriate for curatorship	We are of the view that PAJA is not entirely appropriate in the context of curatorship under the Banks Act, for the following reasons: **Uncertainty as to which act is covered by the remedies under PAJA** The Banks Act involves a number of actions by the curator and the minister prior to the implementation by the curator of his proposal which, because they may not necessarily involve the implementation of the proposal (and thus may have no adverse effect on creditor rights and may have no direct external legal	National Treasury's view is that PAJA affords adequate protection for creditors and that there is no legal basis on which the creditors of a bank should be in a preferred position when compared to any other person who has to rely on PAJA for his/her protection.

		effect) would not be capable of being challenged by the creditors under PAJA. Such acts could include the mere formulation of the restructure plan by the curator, as well as referring a plan to the Minister for consent in terms of s54 by the curator. It is only at the time that the plan is implemented by the curator, and after the s54 approval, that the creditors would be able to claim that an administrative act has occurred. The effect of implementation by the curator of his plan may be difficult or impossible to reverse once approved by the Minister or implemented and, irrespective of whether or not it could be set aside in whole or in part, could cause irreparable and irreversible harm to the interests creditors (and thus to confidence in the banking system in the Republic). To avoid this scenario, it is important to reduce uncertainty around the procedures required to be followed under PAJA read together with the Banks Act. **Uncertainty as to which administrator must afford the creditors with a right to procedural fairness** Given that the plan to be implemented will involve an interaction between the Minister and the curator (each of whom is given responsibilities under the Banks Act), it is unclear from PAJA which of these functionaries would be responsible for affording the creditors the procedural fairness rights conferred by PAJA. This creates uncertainty as to what is required procedurally for all stakeholders: the curator, the Minister, the investors and the creditors alike. This would be allayed by specifying, broadly, the procedure to be followed in the Banks Act itself. Procedural fairness under PAJA consists of: • giving the person affected adequate notice of the nature	

		and purpose of the proposed administrative action; • giving the person affected a reasonable opportunity to make representations to the administrative decision maker; • giving the person affected a clear statement of the administrative action proposed to be taken; • giving the person affected adequate notice of any right of review or internal appeal, where applicable; and • giving the person affected adequate notice of the right to request reasons in terms of section 5 of PAJA. Again, it is unclear which of the Minister or the curator would be required to fulfil these requirements and at what stage of the Section 54 process this would have to occur. Clearly specifying in the legislation that the curator is required to provide information to the creditors prior to submitting the proposal to the Minister would go a long way to creating legal certainty in respect of the third procedural fairness requirement (a clear statement of the administrative action proposed to be taken) and, by extension, the first two requirements of procedural fairness. **Exceptions to procedural fairness** PAJA permits procedural fairness to be departed from in certain instances, taking into consideration, amongst other things, the urgency of taking the administrative action. Given the position adopted thus far by the curator that the implementation of the restructure is of critical urgency, the creditors fear that reliance will be placed on this exception to depart from or otherwise truncate the principles of procedural fairness. This fear would be allayed if the procedure to be followed was mandatory and could	

		not be departed from by the curator. **Codifying procedural requirements provide certain grounds for judicial review** Codifying a procedure for the curator to follow permits reliance on "*A mandatory and material procedure or condition prescribed by an empowering provision not being complied with*" as a ground for judicial review which is much more easily assessed than the less certain ground of "*Procedural unfairness*".	